

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEENAN LEE ROBINSON,

Defendant-Appellant.

UNPUBLISHED

July 19, 2007

No. 269605

Wayne Circuit Court

LC No. 04-005425-01

Before: Meter, P.J., and Talbot and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree fleeing and eluding, MCL 750.479a(4), carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and three counts of felonious assault, MCL 750.82. Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to twenty to thirty years in prison for the second-degree fleeing and eluding conviction, eight to fifteen years each for the carrying a concealed weapon, felon in possession of a firearm, and three felonious assault convictions, and five years for the felony-firearm conviction. We affirm.

Defendant's first argument on appeal is that the trial court erred in admitting evidence of his two prior fleeing and eluding convictions under MRE 404(b). Alternatively, he argues that his trial counsel's failure to object to the admission of that evidence constituted ineffective assistance of counsel.¹ We disagree.

Waiver is the intentional relinquishment or abandonment of a known right. *People v Carines*, 460 Mich 750, 762-763 n 7; 597 NW2d 130 (1999). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (internal citation and quotation marks omitted). Because defendant's trial counsel explicitly

¹ Defendant acknowledges that evidence of a prior fleeing and eluding conviction was necessary in order for the prosecutor to prove that defendant committed second-degree fleeing and eluding, see MCL 750.479a(4), but he contends that "it should have been handled by stipulation, as was done with the [f]elon in [p]ossession of a firearm [c]ount."

agreed to the admission of defendant's two prior fleeing and eluding convictions, the claim of error with respect to the admission of this evidence has been waived.

Regarding the issue of ineffective assistance of counsel, we note that defendant did not move for a new trial or a *Ginther*² hearing before the trial court.³ Accordingly, appellate review is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). "If the record does not contain sufficient detail to support [a] defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* In general, we review a trial court's findings of fact for clear error. *Id.*⁴ We review questions of constitutional law de novo. *Id.*

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). In order to overcome the presumption, the defendant must "show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *Id.* The defendant must show that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and that the deficiency was so prejudicial that he was deprived of a fair trial, i.e., that there is a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different. *Id.*; *LeBlanc, supra* at 582-583. "The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). This Court will not revisit matters of trial strategy with the benefit of hindsight. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant has failed to overcome the presumption that his trial counsel's actions were a matter of strategy. Counsel's strategy in the face of substantial evidence that defendant had fled from and eluded police was to concede that point but question the evidence that he was carrying a gun and portray the police officer's shooting of defendant as unnecessary and unjustified. To that end, counsel portrayed defendant as someone who had been in some trouble and did not want to stop for the police but was not violent and did not have a gun. Evidence that defendant had fled from police on prior occasions and had been in trouble with the law was consistent with the way defense counsel was trying to portray defendant.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

³ Although defendant filed a motion to remand for a *Ginther* hearing with this Court, this motion was denied.

⁴ As noted, however, defendant failed to move for a *Ginther* hearing below, and our review is limited to the existing record.

Even if defendant could show that his counsel's decision not to object to the admission of the MRE 404(b) evidence constituted deficient performance, he would still be unable to establish that the deficiency was prejudicial. There is nothing to suggest that the outcome of the trial would have been different had this evidence not been admitted, because there was substantial evidence that defendant committed the crimes charged. Three men testified that, as they were riding in a Grand Marquis, a man driving a burgundy van pulled in front of them and aimed a gun at the driver of their car. The driver of the Grand Marquis and the man in the passenger's seat both saw the gun, and two of the men identified defendant in court as the driver of the van. The third testified that although he could not identify the perpetrator for certain, defendant had the same complexion as the perpetrator. Two police officers, both of whom identified defendant in court, testified that they pursued defendant in their police car. The jury was also shown a videotape of this pursuit taken from a camera in the patrol car. Both officers testified that they pursued defendant on foot, defendant was holding a gun during the chase, and one of the officers told defendant to drop his weapon before the officer fired three to four shots. Given the evidence against defendant and the fact that evidence of a prior fleeing and eluding conviction would have alternatively come in by way of a stipulation, the MRE 404(b) evidence likely had little effect on the outcome of the trial.

Defendant's second argument on appeal is that he is entitled to resentencing because the trial court did not score a sentence information report for each of defendant's convictions. We disagree.

This Court reviews a trial court's scoring decision for an abuse of discretion. *Cox, supra* at 453-454. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any support will be upheld." *Id.* The determination whether the statutory sentencing guidelines apply and the interpretation of those guidelines are questions of law subject to de novo review. See *id.* and *People v Hendrick*, 472 Mich 555, 559; 697 NW2d 511 (2005).

First, felony-firearm, MCL 750.227b, does not fall under the statutory sentencing guidelines, see MCL 777.16m and *People v Johnigan*, 265 Mich App 463, 472; 696 NW2d 724 (2005), and therefore that offense never requires the scoring of a sentence information report. Second, MCL 777.21(2), as construed in *People v Mack*, 265 Mich App 122, 126-128; 695 NW2d 342 (2005), requires scoring of a sentence information report only for the conviction with the highest crime class when the defendant has multiple convictions with concurrent sentences. In this case, the trial court scored a sentence information report for second-degree fleeing and eluding, which was defendant's highest crime class conviction. Second-degree fleeing and eluding is a Class D felony, MCL 777.16x; felon in possession of a firearm and carrying a concealed weapon are Class E felonies, MCL 777.16m; and felonious assault is a Class F felony, MCL 777.16d. As noted above, the sentencing guidelines do not apply to felony-firearm. See MCL 777.16m. Therefore, the trial court did not abuse its discretion in scoring a single sentence information report for all defendant's convictions.

Affirmed.

/s/ Patrick M. Meter

/s/ Michael J. Talbot

/s/ Donald S. Owens